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No. 04-287

Supreme Court, U.S.
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In The

Supreme Court of the United States

CITY OF MARYSVILLE, WASHINGTON,

Petitioner,

v.

VINE STREET COMMERCIAL PARTNERSHIP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Washington, Division I

BRIEF IN OPPOSITION

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STATEMENT

The Respondents are owners of property located outside of the boundaries of the Petitioner, City of Marysville. In 1971 the Petitioner, pursuant to authority duly adopted, formed a Utility Local Improvement District ("ULID"), and the Respondents' properties were included in the area encompassed by this ULID. As part and parcel of the ULID, the Petitioner installed the utilities contemplated by the ULID, and after completion of the installation assessed each of the properties included in the ULID area, including the Respondents' properties. At the time the ULID was formed and approved by the legislative body of the Petitioner, the assessments became a lien upon the Respondents' properties, which the Petitioner had the authority to enforce through collection in the event the assessment was unpaid.

After the formation of the ULID, the Petitioner enacted an ordinance that required as a condition of providing utility service to properties outside of the city limits the property owner would be required to either annex to the Petitioner city, or in the alternative, sign a covenant agreeing not to protest future annexation (the "Annexation Requirement"). The Petitioner contended that the ordinance applied to the Respondents' properties.

After the Respondents had paid the assessments levied under the ULID in full, the Respondents sought utility service from the Petitioner, which request was denied. The Petitioner justified its refusal to provide the requested service because the Respondents had executed an annexation petition to a neighboring city, and therefore could not comply with the Petitioner's Annexation Requirement.

The Respondents' objected to this refusal claiming a contract right based upon the ULID, and further contending

that the later enactment of the ordinance adding a new condition constituted an unconstitutional impairment of that contract right in contravention of the Contract Clause contained in both the United States Constitution and Washington State Constitution. After the Petitioner reversed its position, and agreed to provide utility service to the Respondents, the Respondents commenced an action against the Petitioner to recover damages for breach of contract, as well as a claim under Section 1983.[1]

In addition to the procedural history reported by the Petitioner, the Petitioner sought discretionary review of both Court of Appeals' decisions to the Washington Supreme Court, and on each occasion review was denied.

At present the case is on remand to the Superior Court of the State of Washington for a determination of the Respondents' damages resulting from the unlawful impairment of their contract right. The Respondent, Vine Street, claims damages based upon its inability to develop its property without the utility connection that was wrongfully denied.

REASONS FOR DENYING THE PETITION

1. The Decision of the Lower Court is not in Conflict with a Previous Decision of this Court.

The Petitioner contends that the decision of the court below is in direct conflict with a decision of this Court, *Carter v. Greenhow*, 114 U.S. 317 (1885). The City contends

[1] In the instant case, the Court of Appeals acknowledged that the plaintiffs have properly pled a § 1983 case. See *Decision of Court of Appeals in Vine Street II*, page 11.

that this case "plainly stated that an action for damages is not available to a plaintiff for unconstitutional impairment of a contract right."[2] However, under plain reading of *Carter*, and as seen in subsequent decisions, that is not the holding of *Carter*.

More importantly for this Court's consideration, however, is whether a real conflict exists between the decisions of this Court, and the decision in the Court below. The respondent respectfully submits that no conflict exists after the decision in *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). As this Court stated in *Dennis*:

> "This case presents the question whether suits for violations of the Commerce Clause may be brought under 93 Stat. 1284, as amended, 42 U.S.C. § 1983. ***We hold that they may.***" (emphasis added) *Id.* at 440.

This Court further stated:

> "As the Supreme Court of Nebraska recognized, see 234 Neb., at 430, 451 N.W. 2d., at 678, there is a division of authority on the question whether claims for violations of the Commerce Clause may be brought under § 1983. We granted certiorari to resolve this issue, 495 U.S. 956 (1990), and we now reverse."[3]

Accordingly, the very reason that this Court accepted review in *Dennis* was to resolve the very question that the

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[2] Petition at 11.

[3] The lower court in *Dennis* dismissed the petitioner's Section 1983 claims.

Petitioner contends is yet unresolved. The Respondents submit that *Dennis* resolved the issue once and for all.

2. A Plaintiff Whose Contract Is Breached as a Result of the Enactment of Legislation in Violation of the Contracts Clause has a Cause of Action under Section 1983.

Section 1983 protects an extremely broad range of rights guaranteed by the United States Constitution and federal law:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the derivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. . . . " 42 U.S.C. § 1983.

The broad range of rights guaranteed by Section 1983 was recognized by the *Dennis* court:

> "A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "*any* rights, privileges, or immunities secured by the Constitution and laws. Accordingly, we have repeatedly held that the coverage of [§ 1983] must be broadly construed."[4] (emphasis in original)

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[4] *Id* at 443, Citing *Golden State Transit Corp v. Los Angeles*, 493 U.S. 103, 105 (1989).

The legislative history of Section 1983 also stresses that as a remedial statute, it should be liberally and beneficently construed against all forms of official violation of federally protected rights.[5] As noted in *Dennis*, this court has rejected attempts to limit the types of constitutional rights that are encompassed within the phrase "rights, privileges, or immunities." This Court has refused to limit the phrase to "personal" rights, as opposed to "property" rights.[6]

The respondents in *Dennis* argued that the Commerce Clause was nothing more than a power allocating provision, whereby Congress is given the pre-emptive authority over the regulation of interstate commerce. The logical conclusion, then, that would follow from such an argument is that the redress is limited to a declaration that the states' intrusion into an area pre-empted by Congress would be to declare the state action void. However, this Court in *Dennis* recognized that the Commerce Clause does more than confer supreme authority on the Federal Government; it is also a "substantive restriction on permissible state regulation."[7] This substantive restriction not only entitles the aggrieved party to seek and obtain declaratory and injunctive relief avoiding the impermissible legislation, but also entitles that party to obtain "retrospective relief 'that will cure any unconstitutional discrimination'"[8] resulting from the improper legislation.

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[5] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684 (1978).

[6] *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

[7] *Dennis* at 447.

[8] *Dennis* at 447.

The retrospective relief to which the aggrieved party is entitled are the damages that result from the enactment of the oppressive legislative act. Accordingly, the combined restriction on state power and entitlement to relief amount to a "right, privilege, or immunity" under the ordinary meaning of those words.[9]

Admittedly, this does not mean that all federal statutes confer a "right" within the meaning of Section 1983. This Court established three (3) considerations for determining whether a "right" has been conferred.[10] The *TM Park*[11] court then continued, stating that the very factors stated in *Golden State* weigh in favor of finding a cause of action under Section 1983 as a result of a Contract Clause violation. First, the Contract Clause does not express a mere "preference" for certain types of treatment, but instead creates a binding obligation on the part of government to refrain from enacting legislation that impairs contract.[12] Secondly, the plaintiffs have a "concrete," as opposed to a "vague and amorphous" right. Thirdly, the Contract Clause was clearly intended to benefit parties to the contract in question, without which benefit the parties to the contract would be unable to avail themselves of the limitations imposed upon legislation, and the corresponding right of

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[9] *Dennis* at 447.

[10] *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989).

[11] *TM Park Ave. Assocs. v. Pataki*, 44 F. Supp. 2d 158 (N.D.N.Y. 1999).

[12] *TM Park* at 163.

action that to those injured by legislation that exceeds those limitations.[13]

The Petitioner argues that *Carter* remains as viable authority for the proposition that the only remedy available for claimed violations of the Contract Clause is the declaration that the legislation declaring the legislation invalid, and that no substantive damage claim is allowed. However, *Carter* was distinguished in a significant line of cases commencing nearly immediately following the decision itself. *Carter* was distinguished as a matter of pleading as early as 1939,[14] and prior to the decision in *Dennis* as recently as 1979.[15] Following those decisions this Court in *Dennis* expressly distinguished *Carter*, and concluded that the petitioner's Commerce Clause claim could be brought under Section 1983.[16] In so doing, this Court plainly stated that the Commerce Clause does confer "rights, privileges, or immunities" within the meaning of Section 1983.

Subsequent decisions of other courts have followed the holding of *Dennis*. In 1999 the District Court of New York held that a violation of the Contract Clause would give rise to a claim under Section 1983.[17] In *TM Park* the court, like the court in *Dennis*, recognized that the decision in *Carter* was limited to a matter of pleading, that is, *Carter* was

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[13] *Id.* at 163.

[14] *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.).

[15] *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613, n. 29 (1979).

[16] *Dennis* at 451.

[17] *TM Park Ave. Assocs. v. Pataki*, 44 F. Supp. 2d 158 (N.D.N.Y. 1999); *reversed on other grounds*, 214 F.3d 344 (2000).

pled as a breach of contract claim, and did not seek redress for a deprivation of a right secured to the plaintiff under a clause of the Constitution "to which he had 'chosen not to resort.'"[18] In fact, the implicit holding of *TM Park* is that had the plaintiff in *Carter* sought redress under this Constitutional provision, relief could have been afforded under Section 1983.[19] As succinctly stated by the court in *TM Park*:

> "In other words, because *Carter* failed to plead that he was deprived of a right guaranteed to him by the Contract Clause, he did not state a claim under § 1983. Accordingly, it becomes apparent that the *Carter* court did not hold that § 1983 was not a proper avenue to redress a violation of the Contract Clause, but only that the facts in *Carter's* complaint failed to show a cause of action within § 1983's terms."[20]

The court in *TM Park* then continued following the analysis of *Dennis*, noting that the factors cited in *Golden State* weigh in favor of recognizing a cause of action under Section 1983.[21]

Further support for the conclusions reached in both *Dennis* and *TM Park* is the Ninth Circuit's decision in *Southern California Gas v. City of Santa Ana*, 336 F.3d

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[18] In *Carter* the petitioner's claim was dismissed as the amount in controversy was below the jurisdictional threshold of the court. The only remaining contention which would permit the court to retain jurisdiction would be a violation of a Federal Statute, which the court found had not been properly pled.

[19] *TM Park* at 162.

[20] *TM Park* at 162 (emphasis added).

[21] *TM Park* at 163.

885 (July, 2003), wherein it was held that a 42 U.S.C. § 1983 claim can be based solely upon a violation of the Contract Clause of Article 1, Section 10 of the U.S. Constitution:

> "The Gas Company's complaint specifically stated that its Contracts Clause claim was 'brought pursuant to 42 U.S.C Section 1983 and related California law.' The City's argument that section 1983 provides no relief for a party deprived its rights under the Contracts Clause is without merit. Section 1983 provides for liability against any person acting under color of law who deprives another 'of any rights, privileges, or immunities secured by the Constitution and laws' of the United States. 42 U.S.C. Section 1983. The rights guaranteed by section 1983 are 'liberally and beneficently construed.' *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 684, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). ***The right of a party not to have a State, or a political subdivision thereof, impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may therefore give rise to a cause of action under section 1983.***"[22]

Just as in *Dennis*, the court in *TM Park* recognized that the Contract Clause, like the Commerce Clause in *Dennis* "confers a right, privilege, or immunity because it is a

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[22] *Southern California* at 886-887 (emphasis added).

substantive restriction on permissible state legislation that would impair the obligation of contracts."[23]

In addition, the Ninth Circuit also held that the Supreme Court's decision in *Carter v. Greenhow* "is not to the contrary":

> "The Supreme Court has explicitly given *Carter* a narrow reading and rejected the interpretation advanced by the City. *See Dennis*, 498 U.S. at 451 n. 9, 111 S. Ct. 865 (stating that *Carter* can only be read to have "held *as a matter of pleading* that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the right secured to him by that clause of the Constitution [the Contract Clause], to which he had chosen not to resort." (emphasis added) (internal quotations and citations omitted).[24]

As noted by the *TM Park* court,[25] " . . . [a] number of courts, while not specifically addressing whether or not a Contract Clause claim is actionable pursuant to Section 1983, impliedly accepted the position that it is by allowing Contract Clause claims to proceed under Section 1983."[26]

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[23] *TM Park* at 163.

[24] *Southern California* at 886-887.

[25] *TM Park* at 164.

[26] See, e.g., *For Your Eyes Only, Inc. v. City of Columbus*, 281 F.3d 1209, 1212 (11th Cir. 2003); *Picard v. Members of the Employee Ret. Bd.*, 275 F.3d 139, 142 (1st Cir. 2001); *Shaffer v. Schenectady City Sch. Dist.*, 245 F.3d 41, 42 (2d Cir. 2001); *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 996 (7th Cir. 2000); *Larsen v. Senate of the C'wealth*, 154 F.3d 82, 86 (3d Cir. 1999); *Smith v. City of Enid*, 149 F.3d 1151, 1154 (10th Cir. 1998); *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1074 (6th Cir. 1998); *Heart of Am. Grain Inspection Serv. v. Missouri Dep't of*

(Continued on following page)

To the contrary, the Petitioner relies upon two cases in support of its contention that a Contract Clause violation will not support a Section 1983 claim, *United States v. Winstar*[27] and *Andrews v. Anne Arundel County.*[28] However, in *Winstar* the issue was not presented to this Court, and Andrews was criticized by the decision in *TM Park*.

Turning first to *Winstar*, the primary distinguishing feature is that this case did not involve a § 1983 claim at all. In *Winstar* the plaintiffs were three different thrift institutions that claimed to be the beneficiaries of contracts with the Government, and that regulations adopted subsequent to the contract formation prevented the Government from performing its contractual obligations. The plaintiff claimed simply that the Government's subsequent inability to perform its contractual obligations amounted to a breach of contract, nothing more, nothing less. The plaintiff institutions did not claim damages under Section 1983 as a result of the constitutional impairment, but instead, like in *Carter*, simply sought breach of contract damages.

The government defended the thrifts' claims arguing the "unmistakability" doctrine; that is, that the government has not surrendered its right to alter previous legislation by subsequent legislation unless that intent is "unmistakably" apparent in the former legislation. Therefore, unless the government has unmistakably surrendered

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Agric., 123 F.3d 1098, 1106 (8th Cir. 1997); *Kestler v. Board of Trustees of N.C. Local Gov'tl Employees' Retirement Sys.*, 48 F.3d 800, 801 (4th Cir. 1993).

[27] 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).

[28] 931 F. Supp. 1255 (D. Md.1996).

the right to enact future legislation, then the government is not constrained from doing so. However, this doctrine has little to do with the government's contractual liability if the subsequent changes prevent the government from performing previously existing contractual obligations. In short, *Winstar* does not say that the government cannot enact legislation that impairs existing contracts, but that it must bear the burden of doing so if its performance under those existing contracts is prevented as a result of that legislation. Citing *Holmes*,[29] what the promissor does is not insure that the promise will be fulfilled, but instead he assumes the risk (as measured in damages) that the promise will be fulfilled.[30] In *Winstar* the plaintiffs did not claim that the previous regulations could not be changed, nor did they claim that the new regulations did not apply to them, but instead that in making the promise the government assumed the risk that as a result of subsequent legislation, or for other reasons, that it would be unable to perform on its previous promise. A contract always involves a promise to provide something that is beyond the promissor's absolute control.[31]

The reference to *Carter* in *Winstar* that is cited by the Petitioner is actually in a footnote in the majority opinion, the text of which was intended as a criticism of Justice Scalia's own theory of unmistakability " . . . [w]hich would

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[29] *Winstar* at 869.

[30] In his dissent in *Winstar*, Justice Scalia also cites *Holmes*, stating that a contract is not a "guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *Winstar* at 919 (Scalia, J.).

[31] *Winstar* at 868-869; see also *Day v. United States*, 245 U.S. 159, 161 (1917).

apply in a wide range of cases and so create some tension with the general principle that the Government is ordinarily treated just like a private party in its contractual dealings."[32] The majority observed that Justice Scalia's theory of unmistakability would apply in a wide range of cases which would be satisfied by an inference of fact, and would result in a low barrier to constitutional litigation. Justice Scalia observed that aggrieved parties would have a common law contract remedy, citing *Holmes*. The citation to *Carter* by the majority is merely to point out that remedies other than damages, such as specific performance, may be available to aggrieved plaintiffs. In that context, the majority cites *Carter*, for the proposition that a plaintiff could seek, *in lieu of damages*, "to have a judicial determination declaring the nullity of the attempt to impair the contract obligation"[33] which is exactly what the Court in *Dennis* limited the *Carter* holding to because of the *Carter's* failure to plead a damage claim under Section 1983.[34]

In the end, however, both the *Winstar* majority and Justice Scalia reached the same conclusion, i.e., the government is liable to the plaintiffs for the damages that resulted from the government's enactment of the subsequent legislation that impaired previously existing contracts. However, neither *Carter* nor *Winstar* stand for the proposition that a violation of the Contract Clause does not constitute a deprivation of "rights, privileges, or

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[32] *Winstar* at 887.

[33] *Winstar* at 887.

[34] A further distinction is the fact that *Winstar* did not include a Section 1983 claim, but only a claim for damages based upon the government's breach of contract.

immunities," which will give rise to a cause of action under Section 1983. Because a Section 1983 claim was not made in either case, this issue was simply not before the court. To the contrary, the issue of a Section 1983 claim for a violation of the Commerce Clause was squarely before this Court in *Dennis*, and this Court held, in no unmistakable terms, that when properly pled a violation of the Commerce Clause would support a Section 1983 claim.

However, and most importantly, *Winstar* actually supports the position of the Respondent. Although most of the cases addressing the propriety of a breach of contract action arising out of an unconstitutional impairment involve a Section 1983 claim, as pointed out above, this was not the case in *Winstar*. In *Winstar* the plaintiffs did not assert a Section 1983 claim, but instead made a common law breach of contract claim.[35] In affirming the lower court, this court applied the ordinary principles of contract construction and breach that would be applicable to any contract action between private parties.[36]

Winstar is just like the case before the court. In *Winstar*, the subsequent legislation left the government unable to perform its contractual obligation to accept the previously accepted capital requirements. It did not mean that the government could not change these requirements,

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[35] "Believing that the Bank Board and FSLIC had promised them that the supervisory goodwill created in their merger transactions could be counted toward regulatory capital requirements, respondents filed suit against the United States in the Court of Federal Claims, seeking monetary damages on both contractual and constitutional theories." The lower court granted the Respondents' motion for summary judgment holding that the Government had breached its contractual obligations. *Winstar* at 858.

[36] *Winstar* at 871.

but instead held the government liable if it did change the rules. The government would bear the risk of loss resulting from that change, which loss was measured by the plaintiffs' common law contract damages. In the case at bar, the Petitioner promised utility service to the Plaintiffs. This did not necessarily mean that the Petitioner could not subsequently change the requirements for obtaining that service, but the Petitioner bears the risk that such change might result in a breach of the previously existing agreement.

It must be remembered that one of the initial statements of the Petitioner is that *"over 100 years ago this Court plainly stated that a cause of action for damages is not available to a plaintiff for unconstitutional impairment of a contract right."*[37] However, and aside from all the attention given § 1983, both the majority and dissent in *Winstar* reject this conclusion.

As a practical matter, this Court observed that:

> "An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[38]

To hold that the government is not liable for breaches of its own agreements resulting from the enactment of

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[37] Petitioner's Petition at 11 (emphasis added).

[38] *Winstar* at 895; citing *Lynch v. United States*, 292 U.S. 571, 579 (1934).

legislation, would render contracts with the Government meaningless. The ability of parties who contract with the Government to rely upon the sanctity of their agreements without the fear that the Government's obligations can be erased with the stroke of a pen insures that the Government "is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting."[39]

Both the majority and the dissent in *Winstar* reached the same conclusion, albeit for different reasons, that the Government had breached its express promise, and was liable to the thrifts on both contractual and constitutional theories. Therefore, the Petitioner is simply wrong when it states that damages are not available to the Respondent as a result of the Petitioner's impairment of a contract right. *Winstar* reached exactly the opposite conclusion.

The only other case cited by the City in support of the Respondent's contention that no common law damage cause of action exists as a result of unconstitutional impairment was *Andrews v. Anne Arundel County*, 931 F. Supp. 1255 (D. Md.1996). However, the decision in *Andrews* is not a good candidate for the City's position.

First, that decision is expressly contrary to the interpretation of *Carter* by the U.S. Supreme Court in both *Dennis* and *Monell* where *Carter* was construed narrowly to exclude a Section 1983 claim for a Contracts Clause violation solely because a Section 1983 claim was not pled.[40]

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[39] *Winstar* at 913 (Breyer, J., concurring).

[40] See *Dennis* at 443, note 4 citing *Monell v. City of New York Dept. of Social Services*, 436 U.S. 658, 684, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Second, *Andrews* also ignored the statement in *Dennis* that Section 1983 should be "liberally and beneficently construed."[41]

> "Even more relevant to this case, we have rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities.'" *Dennis* at 445-446.[42]

Third, as pointed out in *TM Park*, if Section 1983 can be used to assert a claim under the Commerce Clause as the *Dennis* Court held, the factors supporting that holding are just as compelling with regard to the Contract Clause.[43]

Fourth, as noted by the *TM Park* court:[44]

> "It is unclear, however, from either the district court of Fourth Circuit's opinions in *Andrews* whether they considered *Dennis*."[45]

Therefore, authority cited by the Petitioner is limited to one lower federal court case[46] that lacked any significant

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[41] *Dennis* at 443.

[42] The fact of the matter is that *Andrews* did not even discuss, let alone distinguish, the *Dennis* decision. Indeed, even the court in *TM Park* questioned the persuasiveness of the *Andrews* decision when it stated that it is unclear, however, from either the district court or Fourth Circuit opinions in *Andrews* whether they considered *Dennis*.

[43] Although this decision was vacated on grounds of ripeness in *TM Park Ave. Assocs. v. Pataki*, 214 F.3d 344 (2d Cir. 2000), the Court expressly noted, at pages 349-350, without disapproval, that the District Court's holding that Section 1983 applied to a Contract Clause claim.

[44] *TM Park* at 164.

[45] *Id.*

analysis of the issue and failed to address the *Dennis* holding, and a second decision[47] in which this Court held for the plaintiffs on their claim for common law contract damages arising out of the unconstitutional impairment of the plaintiffs' contract rights.

The Ninth Circuit Court of Appeals, following the lead of the U.S. Supreme Court in *Dennis* and, consistent with other federal cases cited herein, has clearly addressed the issues raised by the City and has concluded that Section 1983 applies to Contract Clause violations of the U.S. Constitution.

CONCLUSION

The Petitioner's major premise is that there is a split of authority on the primary issue before the court, that is, that an aggrieved party cannot make a claim for common law contract damages based upon an unconstitutional impairment. However, the case relied upon by the Petitioner has been distinguished so many times that reliance upon it is misplaced.

Instead, subsequent decisions of this and other courts have recognized that an aggrieved party will have a common law cause of ~~action~~ based upon an unconstitutional impairment,[48] and a cause of action under Section 1983 based upon an unconstitutional impairment.[49] Therefore,

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[46] *Andrews.*

[47] *Winstar.*

[48] *Winstar.*

[49] *Dennis.*

the Petitioner is incorrect when it argues that no cause of action exists, in fact two separate and distinct causes of action exist.

The Respondent requests that the Court deny the Petition.

Respectfully submitted this 28th day of October, 2004.

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